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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,207	04/08/2004	David Alan Benner	BENNER-1	7438

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EXAMINER

FERGUSON, MICHAEL P

ART UNIT	PAPER NUMBER
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3679

DATE MAILED: 07/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/820,207

Applicant(s)

BENNER ET AL.

Examiner

Michael P. Ferguson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 9 and 16 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-15, 17 and 18 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 April 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 04/08/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

DETAILED ACTION

Election/Restrictions

1. This application contains claims directed to the following patentably distinct species of the claimed invention:

Species 1 shown in Figures 1-4

Species 2 shown in Figure 5

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 1-7, 10-14, 17 and 18 are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the

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case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

2. During a telephone conversation with Eric A. LaMorte, Esq. on July 5, 2005 a provisional election was made without traverse to prosecute the invention of Species 1, claims 1-8, 10-15, 17 and 18. Affirmation of this election must be made by applicant in replying to this Office action. Claims 9 and 16 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

3. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Claim Objections

4. Claim 4 is objected to because of the following informalities:

Claim 4 (line 4) recites "a perpendicular". It should recite --a perpendicular angle--.

For the purpose of examining the application, it is assumed that appropriate correction has been made.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

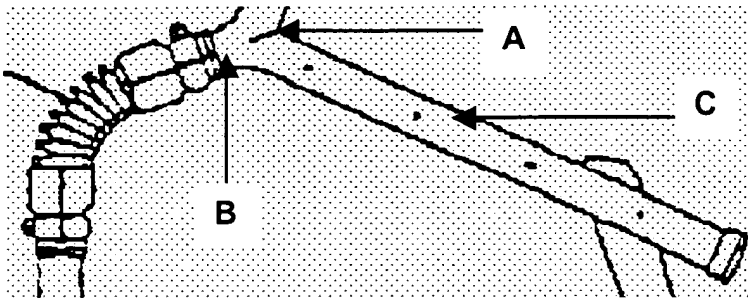
6. Claims 1-6, 10-14, 17 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by D'Ath (US 6,382,596).

As to claim 1, D'Ath discloses a fencing system for confining climbing animals, the system comprising:

a plurality of vertical posts **3b**, each vertical post having a top end and a bottom end;

a plurality of canopy support brackets **3a** that are supported by the vertical posts, each canopy support bracket having a first end, a second end and an apex point **A** (Figure 3 reprinted below with annotations) deposited between the first end and the second end, wherein an ascending section **B** exists between the first end and the apex point, and a descending section **C** exists between the apex point and the second end;

flexible netting **2,6** suspended between the vertical posts and the canopy support brackets, wherein the flexible netting is supported vertically by the vertical posts, the flexible netting is supported in an ascending angle to an apex point above the vertical posts by each the ascending section of the canopy support brackets, and the flexible netting is supported in a descending angle from the apex point to the second end of the canopy support brackets by each the descending section of the canopy support brackets (Figures 1-3).



As to claim 2, D'Ath discloses a system wherein the first end of the canopy support brackets **3a** selectively interconnect with the top end the vertical posts **3b**, whereby the canopy support brackets are supported above the vertical posts (Figure 3).

As to claim 3, D'Ath discloses a system wherein the ascending section **B** and the descending section **C** of each canopy support bracket **3a** is straight (Figure 3).

As to claim 5, D'Ath discloses a system wherein the flexible netting **2** is comprised of intersecting filaments having a diameter of less than 0.10 inches that define net openings of at least one square inch (based on the scale of Figure 1).

As to claim 6, D'Ath discloses a system wherein the flexible netting **2** is black (Figure 1).

As to claim 10, D'Ath discloses a system including ties (inherently; not shown) for selectively binding the flexible netting **2,6** to the vertical posts **3b** and the canopy support brackets **3a** (Figure 1).

As to claim 11, D'Ath discloses a system including a protective mesh **2** that extends partially up the vertical posts **3b** and along the ground (Figure 1).

As to claim 12, D'Ath discloses a system wherein the protective mesh **2** is defined by intersecting metal wires (Figure 1).

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As to claim 13, D'Ath discloses a method of constructing a fence, comprising the steps of:

erecting a plurality of supports **3b** along a periphery to be fenced, wherein each of the supports has a vertical section **3b**, an ascending section **B** that extends at an angle above the vertical section to an apex point **A**, and a descending section **C** that extends downwardly from the apex point to free end;

suspending a flexible netting **2,6** along the supports, wherein the flexible netting is supported vertically by each the vertical section of the supports, the flexible netting is supported an ascending angle to the apex point by each the ascending section of the supports, and the flexible netting supported in a descending angle from the apex point to the free end of the supports by each the descending section of the supports (Figures 1-3).

As to claim 14, D'Ath discloses a method wherein the step of erecting a plurality of supports includes the substeps of:

erecting a plurality of vertical posts **3b**;

attaching a canopy support bracket **3a** to each of the posts, wherein each the canopy support bracket embodies the ascending section **B** and the descending section **C** of each the support (Figure 3).

As to claim 17, D'Ath discloses a method including the step of placing a wire mesh **2** between the supports **3b** proximate the ground (Figure 1).

As to claim 18, D'Ath discloses a method wherein the flexible netting **2** is comprised of intersecting filaments, wherein each filament has a diameter of less than

0.10 inches and the filaments define net openings having an area at least one square inch (based on scale of Figure 1).

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over D'Ath.

As to claim 4, D'Ath fails to disclose a system wherein the ascending section and the descending section of each canopy support bracket intersect at the apex point at a perpendicular angle.

The applicant is reminded that a change in the shape of a prior art device is a design consideration within the skill of the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a system as disclosed by D'Ath wherein the ascending section and the descending section of each canopy support bracket intersect at the apex point at a perpendicular angle as such practice is a design consideration within the skill of the art.

9. Claims 7, 8 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over D'Ath in view of Sparks (US 249,803).

As to claims 7 and 8, D'Ath fails to disclose a system including mounting elements that engage the vertical posts and support the vertical posts a vertical

orientation; wherein the mounting elements are ground anchor sleeves that are selectively driven into the ground, wherein the ground anchor sleeves receive the vertical posts and support the vertical posts in the vertical orientation.

Sparks teaches a system including mounting elements **C** that engage vertical posts **A** and support the vertical posts a vertical orientation; wherein the mounting elements are ground anchor sleeves that are selectively driven into the ground, wherein the ground anchor sleeves receive the vertical posts and support the vertical posts in the vertical orientation; the mounting elements positively mounting and securing the vertical posts in the proper vertical orientation (Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a system as disclosed by D'Ath to have mounting elements as taught by Spark in order to positively mount and secure the vertical posts in the proper vertical orientation.

As to claim 15, D'Ath fails to disclose a method wherein the substep of erecting a plurality of vertical posts includes driving ground anchor sleeves into the ground and inserting a vertical post into each ground anchor sleeve.

Sparks teaches a method wherein the substep of erecting a plurality of vertical posts **A** includes driving ground anchor sleeves **C** into the ground and inserting a vertical post **A** into each ground anchor sleeve; the ground anchor sleeves positively mounting and securing the vertical posts in the proper vertical orientation (Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by D'Ath to have ground

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anchor sleeves as taught by Spark in order to positively mount and secure the vertical posts in the proper vertical orientation.

Conclusion

The prior art made of record and not relied upon is considered pertinent to the applicant's disclosure. The following patents show the state of the art with respect to fencing systems:

Ford (US 3,861,084) and MacDougall (US 4,673,166) are cited for pertaining to systems comprising a plurality of vertical posts, a plurality of canopy support brackets and flexible netting.

Faloon (US 243,696) is cited for pertaining to systems comprising ground anchor sleeves.

Staub, Sr. (US 4,366,949) is cited for pertaining to systems comprising a protective mesh.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael P. Ferguson whose telephone number is (571)272-7081. The examiner can normally be reached on M-F (8:00-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571)272-7087. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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